71-1306

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Supreme Court, U. S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1972

CATHERINE T. PENDERGRAFT ..... Petitioner

V.

TOM D. COOK, SUPERINTENDENT
OF THE MISSISSIPPI
STATE PENITENTIARY ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Mrs. Catherine T. Pendergraft, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered August 13, 1971, by the United States Court of Appeals for the Fifth Circuit dismissing her petition for writ of habeas corpus.

OPINIONS BELOW

The opinion sought to be reviewed is *Pendergraft vs. Cook,* 5 Cir. 1971, 446 F. 2d 1222, rehearing denied ..... F. 2d ..... (No. 71-1598, November 12, 1971). See *Appendix A* and *B.*

The first opinion of the District Court for the Southern District of Mississippi, dated December 30, 1969, granting petitioner's writ of habeas corpus, is unreported. See *Appendix C.* Upon appeal thereafter by the State of Mississippi, the court of appeals rendered its

first opinion, *Pendergraft vs. Cook*, 5 Cir. 1970, 433 F 2d 969, *Appendix D*, remanding the cause for additional findings. Thereafter, the District Court made its findings, *Pendergraft vs. Cook*, S. D. Miss. 1971, 323 F Supp. 967, *Appendix E*, and from this decision, upon appeal by the State and cross-appeal by Petitioner, resulted in the judgment and opinion sought now to be reviewed.

The two previous opinions of the Mississippi Supreme Court, *Pendergraft vs. Mississippi*, 191 So. 2d 830 (1966), 213 So. 2d 560 (1968), are not appended hereto.

JURISDICTION

On August 13, 1971, by a two to one decision, (App. A) the court of appeals affirmed the judgment of the district court as to Petitioner's cross-appeal and reversed the district court as to the direct appeal by the State of Mississippi, and thereby dismissed Petitioner's petition for writ of habeas corpus wherein she had asserted: (1) that the statutory exclusion of women from the grand and petit juries denied her Fourteenth Amendment rights, (2) that a warrantless, pre-arrest search of her home denied her Fourth Amendment rights. A petition for rehearing en banc was timely filed and was denied on November 12, 1971, three judges of the Fifth Circuit dissenting (App. B).

This Court's jurisdiction is invoked pursuant to 28 U. S. C. 2254 (1).

QUESTIONS PRESENTED

1. Whether the complete, arbitrary and unreasonable exclusion of women from jury service, both grand and petit, by Section 1762, Mississippi Code of 1942, denied Petitioner, *as a female*, the due process and equal pro-

tection of the law guaranteed under the Fourteenth Amendment to the Constitution of the United States.

2. Whether the court of appeals erred in reversing the district court's judgment as to the women juror question on grounds that a prospective application of *White v. Crook,* M. D. Ala. 1966, 251 F Supp. 401, precluded Petitioner from the relief she seeks when, in fact, the exclusion of women from jury service in Petitioner's case occurred eleven months after the White decision.

3. Whether Petitioner was denied her right to be secure against unreasonable searches and seizures as provided by the Fourth Amendment of the Constitution by virtue of certain tangible evidence being admitted in evidence against her during trial in state court over her objections that such evidence was gained by a search of her home by officers not having a search warrant and some fifteen hours prior to her arrest on the following day.

STATUTORY PROVISIONS INVOLVED

Section 1762, Mississippi Code of 1942, "Who are competent jurors."

Every male citizen not under the age of twenty-one years, who is a qualified elector and able to read and write, has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, is a competent juror; but no person who is or has been within twelve months the overseer of a public road or road contractor shall be competent to serve as a grand juror. But the lack of any such qualifications on the part of one or more jurors shall not vitiate an indictment or verdict. However, be it further provided that no talesman or tales juror shall

be qualified who has served as such tales juror or talesman in the last preceeding two years; and no juror shall serve on any jury who has served as such for the last preceding two years; and no juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.

STATEMENT OF THE CASE

Petitioner was tried and convicted in December, 1965 in the Circuit Court of Hinds County, Mississippi for the murder of her husband. The conviction was appealed to the Mississippi Supreme Court and the question raised that Petitioner had been denied a fair trial by reason that women were ineligible, by statute, to serve on juries. Her conviction was reversed on other grounds in 1966 and remanded for a new trial.[1] Upon retrial in 1966, she was again convicted, receiving a life sentence. The qustions now presented to this Court were raised, prior to and during the second trial, by: (1) on the women juror question, motions to quash the indictment and the petit jury, (2) on the search and seizure question, pretrial motion to suppress and specific objection during trial, both being overruled. Upon appeal, the same questions were raised in the state appellate court by specific assignment of errors. The second conviction was affirmed in 1968.[2] A Petition for Writ of Certiorari presented to this Court, raising the same questions, was denied, Justice Douglas dissenting.[3]

Having exhausted her state remedies, Petitioner filed a petition for writ of habeas corpus, under 28 U.S.C.

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[1] 191 So. 2d 830 (1966).
[2] 213 So. 2d 560 (1968).
[3] 394 U. S. 715 ( ), Rehearing denied 395 U. S. 941 ( ).

2254, in the District Court of the Southern District of Mississippi, again raising the same two questions. District Judge Dan M. Russell sustained petitioner's contention that she had been denied a proper jury, but declined to pass on the question of an unreasonable search (App. C). The State of Mississippi appealed to the Fifth Circuit and, upon hearing, the case was remanded back to the district court with instructions to pass on the question of the unreasonable search. In its opinion, the court of appeals declined to strike down the state statute as unconstitutional when a proper consideration of the search question might result in a new indictment and new trial for Petitioner (App. D).

Upon remand, the district court adhered to its original position that the petitioner should be reindicted and retried by a jury panel composed of both sexes (App. E).[4] However, on the search question, the district court held that the search was reasonable under the circumstances, although made on the day prior to arrest and without a search warrant.

The State again appealed the women juror question and petitioner cross-appealed the search question. After first affirming the judgment and reasons of the district court on the search question, Judges Coleman and Roney of the Fifth Circuit then held that since the rulings in other cases touching the women juror question,[5] "should not be accorded retrospective effect", Petitioner was not entitled to relief (App. A). Judge Simpson dissented, finding in essence that "the facts of this case did not present a retroactivity problem at all" (App. A). Of this opinion and order of the Court of Appeals, Petitioner seeks a review by this Court.

[4] The Mississippi statute was amended June 14, 1968, allowing women to serve on grand and petit juries.

[5] White v. Crook, M.D., Ala. 1966, 251 F. Supp. 401.

Her Petition For Rehearing En Banc was denied with Judges Simpson, Wisdom and Chief Judge Brown dissenting (App. B).

ARGUMENT

Point I.

The Court of Appeals for the Fifth Circuit erred in failing to find that the complete, arbitrary and unreasonable exclusion of women from jury service, both Grand and Petit, by Section 1762, Mississippi Code of 1942, at the time of Petitioner's indictment in 1965 and second trial in 1967, denied Petitioner, as a female, the due process and equal protection of the law guaranteed under the Fourteenth Amendment to the Constitution of the United States.

The district court correctly granted the petition for writ of habeas corpus on the abovementioned grounds (App. C). Since Petitioner first raised this question in March, 1966, she has asserted the words of *White v. Crook*, M.D. Ala. 1966, 251 F. Supp. 401, wherein a federal three-judge panel, in holding that the statutory exclusion of women from jury service is unconstitutional, said:

> "Women are allowed to serve on juries in the Federal Courts and in Courts of forty seven states. Only in three—Alabama, Mississippi and South Carolina—are women completely excluded from jury service. The time must come when a state's complete exclusion of women from jury service is recognized as so arbitrary and unreasonable as to be unconstitutional. As to Alabama, we can see no reason for not recognizing that fact at the present time."

Petitioner's grand and petit juries lacked approximately one-half of the potentially eligible jurors. There-

fore, she was denied a trial by jury representative of the cross-section of the community and thereby denied her constitutional rights. See, e. g., *Ballard v. United States,* 329 U.S. 187 (1946), *Thiel v. Southern Pacific Company,* 328 U. S. 217 (1946), *Hernandez v. Texas,* 347 U. S. 475 (1954). *In Ballard,* supra, at 195, this Court said:

> "The point illustrates that the exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women like the exclusion of a racial group, *Smith v. Texas,* 311 U. S. 128, or an economic or social class, *Thiel v. Southern Pacific Co.,* supra, deprives the jury system of the broad base it was designed by Congress to have in our democratic society . . ."

That the above expression is still a very valid proposition, consider the recent words of Justice Douglas in his concurring opinion in *Witherspoon v. Illinois,* 391 U. S. 510, 531 (1968):

> ". . . But we do not require a showing of specific prejudice when a defendant has been deprived of his right to a jury representing a cross-section of the community. See *Ballard v. United States,* 329 U. S. 187, 195; *Ware v. United States,* 356 F. 2d 787 (C.A.D.C. Cir. 1965). We can as easily assume that the absence of those opposed to capital punishment would rob the jury of certain peculiar qualities of human nature *as would the exclusion of women from juries . . . .*" (Emphasis ours)

And, in *Abbott v. Mines*, 6 Cir. 1969, 411 F. 2d 353, 355:

"... Although Federal District Judges clearly have discretion in particular cases to regulate the composition of juries, that discretion is and must be stringently circumscribed by the fundamental rule that federal juries must derive from a fair and broadly based cross-section of the community. None of the categories set forth in Section 1863 can be read as allowing *a wholesale exclusion of women.* And *Ballard v. United States*, 329 U. S. 187, 67 S. Ct. 261 (1964) prevents it . . ." (Emphasis ours)

Petitioner asserts that the late Chief Justice Ethridge of the Mississippi Supreme Court, in his dissenting opinion in *Hall v. Mississippi*, 187 So. 2d 861, (1966), app. dism. 385 U. S. 98 (1966) correctly analyzed the unconstitutional aspect of the Mississippi statute:

"The Fourteenth Amendment prohibits prejudicial disparities before the law for all citizens, including women. Over half the population of the United States consists of women . . .

"After hearing this evidence on a motion to quash the indictment, the circuit court correctly concluded: 'This Court believes that the law on the constitutional question involved here is clear. There are rules, just as there are pieces of machinery, that are useful as long as they express life in our society. Life passed them by and left them behind and the rule excluding women • • • denying women the right to serve on juries is one of these rules'.

"... Certainly a statute completely and absolutely excluding over one-half of the population of this state from eligibility for jury service is a classification without any reasonable basis. For physiologic and other

reasons, a state may validly grant women an elective exemption from jury service. But Mississippi wholly denies them the right to participate as members of juries. *A classification must have some reasonable basis in order to comply with due process and equal protection. A complete exclusion of half the population with no rational basis for the classification, other than sex, is a denial to the women citizens of this state of their constitutional rights.*

"In short, I think that a state's complete exclusion of women from jury service is so arbitrary and unreasonable as to be an unconstitutional deprivation of due process and equal protection of the laws . . . ." 187 So. 2d at 870-871. (Emphasis ours)

Point II.

The Court of appeals erred in reversing the district court as to the women juror question on the grounds that a prospective application of *White v. Crook* M. D. Ala. 1966, 251 F. Supp. 401, precluded Petitioner from the relief she seeks when, in fact, the complete and unreasonable exclusion from jury service at the time of Petitioner's conviction occurred eleven months after the *White* decison.

White was decided in February, 1966. Petitioner raised the question of the total exclusion of females from the grand and petit juries at every stage of the proceedings during the second trial in January, 1967 by Motion to Quash The Indictment and the Venire, and thereafter by assignment of error to the Mississippi Supreme Court, and by direct appeal to this Court, on grounds that Section 1762, Mississippi Code of 1942, was repugnant to the Fourteenth Amendment. With due respect to the majority opinion in the court of

appeals, there is apparently a misconception of dates insofar as retroactive or retrospective application is concerned.

Petitioner was indicted in November, 1965 by a grand jury composed entirely of males. On December 10, 1965, she was convicted by an all-male jury. *On February* 7, 1966, *White v. Crook,* supra, was decided. In March, 1966, Petitioner first raised this question in a motion to set aside the verdict. In June, 1966, *State v. Hall,* Miss. 1966, 187 So. 2d 861, was decided, wherein the Mississippi Supreme Court upheld the validity of the statute. On November 7, 1966, the first conviction of Petitioner was reversed on other grounds by the Mississippi Supreme Court.[6] *On January* 9, 1967, Petitioner was convicted the second time by, over her timely objections, an all-male jury (this is the conviction of which Petitioner now complains). On June 31, 1967, *Bass v. Mississippi,* 5 Cir 1967, 381 F. 2d 692 was decided, wherein the Fifth Circuit assumed the unconstitutionality of the statute. On June 14, 1967, the statute was amended by deleting the word "male" therefrom and thereby allowing women to serve on grand and petit juries. On July 3, 1968, Petitioner's second conviction was affirmed by the Mississippi Supreme Court.[7]

If the court of appeals recognized the validity of the *White* condemnation of a statute absolutely excluding women from jury service, it is most difficult to understand why the principal announced in *White* was not applicable some eleven months later when Petitioner objected to the Mississippi statute which similarly absolutely excluded women from jury service in her case.

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[6] 191 So. 2d 830.
[7] 213 So. 2d 560.

The majority opinion cites *Juelich v. United States,* 5 Cir 1968, 403 F. 2d 523. Juelich was convicted in federal court in 1954. The Federal statute, 28 U. S. C. 1961, was amended in 1967, nullifying the former exclusion of women from juries in Federal Court. Juelich waited until 1962 to file his 2255 motion raising for the first time that women were systematically excluded from the petit jury which convicted him. *Hoyt v. Florida,* 368 U. S. 57, (1961), had been decided approximately one year before and *White* was not decided until some four years later; but both decisions were more than several years *after* Juelich's conviction became final. In *Juelich,* the court of appeals said:

> "Assuming, without deciding, as we did in Bass v. Mississippi, 5 Cir. 1967, 381 F. 2d 692, 696, the correctness of this decision, we are of the clear view that it should not be accorded retrospective effect." (Citations omitted)

In contrast, Petitioner asserts that, at the time of any of the decisions condemning the exclusion from jury service, her conviction was not so final as to preclude application of the rule to her objection to the all-male jury composition. As to when a judgment of conviction is final and thereby precluded from benefiting from a new rule, the principal enunciated in *Linkletter v. Walker,* 381 U. S. 618 (1965) is that the word "final" means that the judgment of conviction has been rendered, availability of direct appeal exhausted and the time for petitioning for writ of certiorari has passed.

Petitioner's second conviction was affirmed by the Mississippi Supreme Court on July 3, 1968, one and one-half years *after White v. Crook.* Certiorari was denied by this Court on April 21, 1969, five months after

Juelich v. United States.[8] Applying the *Linkletter* principal, we are faced with the proposition that *White v. Crook, Bass v. Mississippi* and *Juelich v. United States,* insofar as each condemns the unreasonable exclusion of women as jurors, should be applied to Petitioner's conviction by an illegal jury based upon an indictment by an illegal grand jury. As Judge Simpson succinctly said in his dissenting opinion (App. A):

> "It is extremely unfortunate that the false issue of retroactivity vel non is allowed to muddy the majority's consideration of what is really a simple question."

If, for the sake of argument, *Ballard, Hoyt, White, Bass,* and *Juelich,* have not been direct rulings on the unconstitutionality of a state statute that absolutely and arbitrarily excludes women from serving on juries, then, as Judge Simpson said, retroactivity vel non has nothing to do with what is really a simple question. Did Section 1762, as it stood in 1965 when Petitioner was indicted and until 1968 when the statute was amended, deprive her of a fair and impartial trial before a jury composed of a cross-section of the community? As Petitioner asserted in Point I, the arbitrary exclusion of women from jury service by statute denied her Fourteenth Amendment rights.

While it may be true, as the court of appeals stated in its opinion, that "there can be no currently existing justiciable controversy as to the exclusion formerly practiced," (App. A), certainly there existed a controversy between Petitioner and the State of Mississippi in 1965 when she was indicted, and in January, 1967, when she was convicted the second time, both juries

[8] November 15, 1968.

being composed of all males. The fact that Mississippi, through its Legislature, finally heeded the warning flags, first waved in *Ballard v. U. S.* and *Hoyt v. Florida,* does not breathe life into an illegal conviction.

Point III.

Petitioner asserts that the warrantless search for and seizure of certain items by the Police Officers in her home, some fifteen hours prior to her arrest on the following day, was unreasonable and invalid under the provisions of the Fourth Amendment: "The right of the people to be secure and their persons, houses—against unreasonable searches and seizures, shall not be violated —".[9]

The District Court held the search legal and the evidence admissable (App. E):

> ". . . This Court finds that independent of the search there was probable cause to arrest Petitioner, and that ensuing search was valid and necessary for the preservation of evidence, an exigency or special situation recognized in Vale."

The Court of Appeals affirmed the lower Court opinion, "For the reasons set forth in the reported opinion of the District Court . . ." (App. A).

The above holding is contrary to the facts of the case and the decisions of this Court interpreting the Fourth Amendment warrant requirements as to a search of a defendant's home. The record is undisputed that multiple police officers made a general exploratory search of both the interior of Petitioner's home and the sur-

[9] See **Appendix F** and **G** for the Stipulation and Supplemental Stipulation as to the items seized and introduced into evidence, over Petitioner's objection, and as to the facts that the search was conducted without a warrant and at a time when Petitioner had not been arrested.

rounding grounds and seized the items in dispute as evidence on the night of August 26, 1965. The officers had no search warrant. Petitioner was not arrested until the afternoon of the following day. There is no testimony that the police officers were confronted with such a necessitous, urgent or impractical situation as would exempt them from obtaining a search warrant. There is no testimony by the police officers that they were faced with a situation where the items seized were being destroyed by Petitioner or that they felt that Petitioner might destroy the items seized while any one of them secured a search warrant.

One only need look to *Vale v. Louisiana,* 399 U. S. 30 (1970), to see that the court of appeals erred in adopting the district court opinion holding that *Vale* recognized an exception to the warrant requirement in the event of a need for "preservation of evidence". No such exception is mentioned or contemplated in *Vale.* The court of appeals created a new exception to the warrant requirement and such an exception as the need to preserve evidence is so general as to completely obliterate a defendant's Fourth Amendment rights. Police officers always need to preserve evidence.

A warrantless search of a home is per se unreasonable with few exceptions. This Court's recent decision, *Coolidge v. New Hampshire,* 403 U. S. 443 (1971), affirms" . . . that the Police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to an arrest . . ." Emphasizing the same principals which Petitioner has consistently asserted, this Court said:

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate,

are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn." and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." (403 U. S. at 454)

In *Coolidge,* this Court considered, in discussing exigent circumstances and the practicability of securing a search warrant, the following factors: (1) no indication of intent by the defendant to flee; (2) previous ample opportunity for defendant to destroy any incriminating evidence; (3) no suggestion that the items seized were being used for illegal purposes; (4) opportunity for search was not "fleeting"; (5) the objects which the police officers were assumed to have probable cause to search for were neither stolen nor contraband nor dangerous; and (6) the number of officers on the premises made virtually impossible defendant's access to the items seized (403 U. S. at 460). Considering the similarity of factors in the present cause, "by no possible stretch of the imagination can this be made into a case where 'it is not practicable to secure a warrant . . .' " (403 U. S. at 462).

In considering exemptions from the Fourth Amendment requirements, the first inquiry concerns the opportunity of the officers to obtain a search warrant and whether it was impractical, under the circumstances of this case, for one of the numerous officers in and about the premises to seek and secure a search warrant. *Taylor v. United States,* 286 U. S. 1, 6 (1937), *United States v. Jeffers,* 342 U. S. 48, 52 (1951), *Johnson v. United States,* 333 U. S. 10, 14-15 (1948), *McDonald v.*

United States, 335 U. S. 451, 455 (1948). Without a doubt, at least one of the numerous officers on the premises could have obtained a warrant while the other officers remained.

And this requirement holds true regardless of the officer's authority to arrest, regardless of his belief or degree of awareness that the necessary incriminating evidence is then and there situated on the premises. *Agnello v. United States,* 269 U. S. 20, 32-33 (1925), *Vale v. Louisiana,* 339 U. S. 30, 34 (1970), *Johnson v. United States,* 333 U. S. 10, 14 (1948), *Chapman v. United States,* 365 U. S. 610 (1961), *Jones v. United States,* 362 U. S. 257, 270 (1960), *Jones v. United States,* 357 U. S. 493, 497-498 (1958), *Stoner v. California,* 376 U. S. 483 (1964).

CONCLUSION

For either of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. Petitioner has shown that, as a female defendant, she was denied due process and equal protection of the law under the Constitution by the complete and absolute exclusion of women from both the grand jury which indicted her and from the venire from which her petit jury was selected which tried her. In addition, she has shown that her Fourth Amendment rights were violated by the general, extensive and exploratory search of her entire home some fifteen hours prior to her arrest by police officers not having a search warrant and not being incident to a lawful arrest.

Respectfully submitted,

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CERTIFICATE

I, W. E. Gore, Jr., Attorney for Petitioner, certify that I have served two copies of the foregoing Brief and Appendix on Hon. A. F. Summer, Attorney General of the State of Mississippi, this.....day of April, 1972.

.....

W. E. Gore, Jr.